89-272

In The

Supreme Court of the United States

October Term, 1989

SEYMOUR LITTMAN, Individually and as Mayor of the Township of Millstone, DIANAMIC INDUSTRIES, THE TOWNSHIP OF MILLSTONE, a Municipal Corporation of State of New Jersey, and COBBLESTONE-PENN LIMITED PARTNERSHIP,

Petitioners,

vs.

RICHARD GIMELLO, EXECUTIVE DIRECTOR, AND THE HAZARDOUS WASTE FACILITIES SITING COMMISSION,

Respondents.

SUPPLEMENTAL APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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APPENDIX A — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION (JUDGES ANTELL, DEIGHAN AND COHEN) DATED FEBRUARY 22, 1988

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2690-86-T7

SEYMOUR LITTMAN, et als.,
Plaintiffs-Appellants,

v.

RICHARD J. GIMELLO, ET ALS.,
Defendants-Respondents
Cross-Appellants.

and

TOWNSHIP OF EAST GREENWICH, et als.
Plaintiffs-Appellants,

v.

THE HAZARDOUS WASTE FACILITIES SITING COMMISSION, et als.
Defendants-Respondents,
Cross-Appellants.

Argued December 8, 1987—Decided

Before Judges Antell, Deighan and Cohen.

Appendix A

On appeal from Superior Court, Law Division, Monmouth County.

Timothy S. Haley argued the cause for appellant Township of East Greenwich, et als. (Gordon, Gordon & Haley, attorneys; Mr. Haley, on the brief).

Michael A. Pane argued the cause for appellant Townships Seymour Littman, et als.

Francine A. Schott, Deputy Attorney

General, argued the cause for respondents/cross-appellants (W. Cary Edwards, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel; Ms. Schott, on the brief).

Bruce C. Hasbrouck and Lewis G. Adler submitted a brief on behalf of *amicus curiae* Gloucester County.

PER CURIAM

On the consolidated main appeal the order for summary judgment in favor of defendants dated January 15, 1987 is affirmed substantially for the reasons stated by Judge Milberg in his oral opinion of January 7, 1987 for the Law Division.

On their cross-appeals, defendants ask us to reverse the order dated May 1, 1987 denying defendants' application for modification of the court's opinion of December 17, 1986. The language which the State seeks to have stricken consists of *dicta* clearly unnecessary to the decision to the effect that the State engaged "in a course of action that this Court finds irregular,

improper and violative of plaintiffs' right to due process of law." The opinion was implemented by an order dated December 18, 1986 which recited in paragraph seven the court's finding "that the Plaintiffs' constitutional guarantees of procedural due process were denied." Although the court, by the order under review, denied defendants' motion to strike the impugned language from the opinion, it granted defendants' motion to strike paragraph seven in its entirety from the implementing order of December 18, 1986.

As we stated earlier, the language in the opinion is conclusory *dicta* only and cannot govern the course of any future proceedings. Moreover, appeals "are taken from judgments and not from opinions." *Hughes v. Eisner*, 8 *N.J.* 228, 229 (1951).

Affirmed on the appeal and on the cross-appeal.

APPENDIX B — TRANSCRIPT OF DECISION OF HON. ALVIN Y. MILBERG, A.J.S.C., ON CROSS MOTIONS FOR SUMMARY JUDGMENT, IN *EAST GREENWICH V. HAZARDOUS WASTE FACILITIES SITING COMMISSION* AND *LITTMAN V. GIMELLO* DATED JANUARY 7, 1987

SUPERIOR COURT OF N.J.
LAW DIVISION/MONMOUTH CTY.
DOCKET NO.: L07351-86PW

SEYMOUR LITTMAN, individually and as Mayor of the Township of Millstone, DYNAMIC INDUSTRIES, the Township of Millstone, a Municipal Corporation of the State of New Jersey, and COBBLESTONE PENN LIMITED PARTNERSHIP,

Plaintiffs,

-vs-

RICHARD GIMELLY, Executive Director and the HAZARDOUS WASTE SITING COMMISSION,

Defendants.

BEFORE:
HON. ALVIN YALE MILBERG, A.J.S.C.

APPEARANCES:
TIMOTHY S. HALEY, ESQ.
For the Plaintiff.

FRANCINE A. SHOTT, ESQ.
JOHN A. COVINO, ESQ.
Attorney General's Office
For the Defendants.

HAQBROMK & ULIASE, ESQ.
For Gloucester County, amicus curiae

Appendix B

THE COURT: These are consolidated cases, a Chancery Division case, in Gloucester County, Township of East Greenwich versus the Hazardous Waste Facilities Siting Commission, Docket No. C-2498-86, which Judge Miller consolidated with the Monmouth County prerogative Writ Law Action Case, Seymour Littman and others versus Richard Gimello, Executive Director and the Hazardous Waste Facility Siting Commission, Docket No. L-07351-86BW.

Plaintiff in the Monmouth County case, Seymour Littman is the Mayor of the Township of Millstone, State of New Jersey. Plaintiff Dynamic Industries is a corporation of the State of New Jersey, which owns lands in the Township of Millstone, designated as Block 57, Lot2B.

Plaintiff Cobblestone Penn. Limited Partnership is a limited partnership which owns property designated as Block 57, Lot 8A on the tax map of the Township of Millstone.

Defendants are the Hazardous Waste Facilities Siting Commission, and Richard Gimello, the executive director.

The defendants named as third-party defendants, Robert Paterson and Margaret Paterson and Frances Krascvics and Joel Dobryenski.

Robert and Margaret Paterson are the owners of record of real property designated as Block 57, Lot 2 on the tax map of the Township of Millstone. Third party defendant, Joel Dobryenski is the owner of record of real property designated as Lot 57, 2A on the tax map of the Township of Millstone.

Today is the adjourned return day of the plaintiff's motion

in the Monmouth County action for summary judgment, seeking a declaration in this Court that the Hazardous Waste Facilities Siting Act, NJSA 13:1E-49 is unconstitutional as against property owners who have neither consented to consideration or have been compensated for the alleged taking of their property. And that the Hazardous Waste Facilities Siting Commission is not authorized to enter plaintiff properties.

Alternatively, plaintiffs seek to have some of the specific tests which the Commission wishes to perform declared unconstitutional as requiring compensation to be paid.

In opposition to the motion, defendants have filed a cross motion to have this matter transferred to the Appellate Division pursuant to Rule 2:2-3A2, or alternatively dismissing the complaint.

In the Monmouth County action, plaintiffs have filed a first amended complaint in Count one, Cobblestone Penn, Limited Partnership seeks judgment declaring major hazardous waste facilities, — NJSA 13:1E-49, to be violative of the New Jersey Constitution, Article I, paragraph 20, and the United States Constitution, Amendment 14 on its face, and as applied to plaintiffs. And that the Commission's siting process be declared unconstitutional and that the defendant commission be restrained and enjoined from entering the Millstone property and taking further steps to designate the Millstone site as a major hazardous waste facility.

In Count two, plaintiffs, Dynamic and Cobblestone Penn seek to have this Court declare the Commission's attempt to enter onto their land to be ultravires.

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And in Count three, plaintiffs Dynamic Industries and Cobblestone Penn seek to have this Court declare the Commission's siting process, arbitrary, capricious and unconstitutional.

And in Count four, all plaintiffs seek a declaratory judgment construing the rights and occupations of the parties during the siting and licensing.

The major Hazardous Waste Facilities Siting Act, NJSA 13:1E-50 was adopted in 1981 and states in part as follows: "The Legisiature finds and declares that the proper treatment, storage and disposal of hazardous waste generated in this State is today the exception rather than the rule. That the improper treatment, storage and disposal of hazardous waste results in substantial impairment of the environment and the public health. Insuring the proper treatment, storage and disposal of hazardous waste is a public purpose in the best interest of all citizens of this State and that the only way to accomplish this purpose is to provide for the siting, design., construction, operation and use of environmentally accepted major hazardous waste facilities."

In Section 52 of the Act, the Legislature created the Siting Commission. In Section 54 of the Act, the Legislature created The Hazardous Waste Advisory Council. The Commission has two functions under the statute. Its first responsibility is to formulate a major hazardous waste facilities plan, NJSA 13:1E-58.

The plan was adopted in May, 1985 and called the determination of the number and type of new major hazardous waste facilities needed to treat, store and dispose of hazardous waste in this State, NJSA 13:1EA-58B4.

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The second function of the Commission is to purpose and adopt the site designations for the number and type of new major hazardous waste facilities determined to be necessary in the plan, NJSA 13:1E-59A.

The site proposals and designations are to be based upon criteria developed by the New Jersey Department of Environmental Protection, NJSA 13:1E-57.

On February 14th, 1986 the Commission reported that after extensive Statewide effort to identify the most appropriate locations for new hazardous waste facilities, the Commission announced today that its consultant, Rogers, Golden, Alpern, Philadelphia has narrowed the search to eleven potential sites.

Seven of these sites were potential incinerator sites, four were potential land and placement sites. One of the potential incinerator sites is the property in Millstone Township, which is the subject matter of this litigation.

Before any of the potential sites can be earmarked as proposed sites, site specific investigation must be conducted to determine conformity of the sites to such regulatory factors as the flow of ground water, and the depth of seasonally high water tables.

To date the Court believes the Commission has completed testing and consideration of two of the eleven sites originally proposed. Both sites, one located in Franklin Township and another in South Brunswick Township were found not to meet the regulatory criteria concerning groundwater and were eliminated from further consideration, based on those criteria.

Testing is now underway at the potential site in Bedminister

Township. The Commission's right to conduct the testing at Bedminister was at issue in *Forbes v. Siting Commission, Docket No. L-044961-86E.* Judge D'Anuzzio approved the right of the Commision to conduct the testing and the Appellate Division confirmed that judgment and the Supreme Court has since denied certification.

Subsequent to the decision in Forbes, the Appellate Division refused to impose restraints against the testing, and the Supreme Court similarly refused those restraints and testing began.

In Burlington Township, the location of another site, a land owner and a municipality brought a suit in Federal Court, seeking to restrain the testing there. The restraints were denied by Judge Thompson on November 28th, 1986.

On December 1, 1986 the land owner filed a similar complaint in the Law Division, Burlington County. Judge Wells denied restraints and the preliminary walk over phase of the testing has been initiated and actual testing, I understand, will commence shortly, if it has not already commenced.

An action virtually identical to the one brought before this Court was also brought before the Chancery Division, Gloucester County concerning a potential site in East Greenwich Township. That case has now been consolidated with the Monmouth County case.

Restraints imposed by Judge Miller, sitting in Chancery in that case were dissolved by the Appellate Division and leave to appeal that dissolution was denied by the Supreme Court.

Testing has either begun or is expected to commence shortly

in East Greenwich. Testing is underway, or about to be underway at potential sites in Readington, Teaksbury, Maurice River and Hillsborough Township.

Plaintiffs also seek to restrain the testing in this Monmouth County action, but I denied that request on November 19th, 1986. Leave to appeal that order was denied by the Appellate Division subject to the State's representations that it would exercise the best efforts to accommodate the plaintiffs' experts. Plaintiffs subsequently appealed to the Supreme Court. Their request for relief was denied.

In the Gloucester County action, plaintiffs moved for summary judgment. Defendants cross moved for transfer of the case to the Appellate Division or in the alternative, for the dismissal of plaintiffs' complaint. The plaintiffs in that action were the Township of East Greenwich and numerous land owners. The defendants are the Hazardous Waste Siting Commission and Richard Gimello, the Executive Director.

In the Gloucester County action, the defendants allege that they own land which was identified as a potential site for a hazardous waste facility. The complaint demanded judgment declaring the Hazardous Waste Siting Act as arbitrary, capricious and unconstitutional, and that the Commission's attempts for entering onto plaintiff land were ultravires, and that the designation of the East Greenwich site was also ultravires and violative of the United States Constitution, 14th. Amendment.

On December 18th, 1986, Judge Miller disposed of the lititants' motions in order that the defendant's motion to restore the case to the active list be granted, that the County of Gloucester be permitted to participate Amicus Curiae.

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Plaintiffs' motion for Summary Judgment was denied that Gloucester County Action be transferred to Law Division, Monmouth County and consolidated with the action that is here today. And that the defendant's motion to transfer the matter to the Appellate Division or alternatively dismiss the action was denied.

As a result of Judge Miller's order, the Gloucester County case is now consolidated here today. Defendants have called to the Court's attention the fact that East Greenwich has permitted its own consultant to conduct similar tests on its property. That has no bearing on the alleged intrusive nature of the testing because something consented to cannot by its very definition be considered intrusive.

First plaintiffs allege that they are entitled to summary judgment declaring the Siting Act unconstitutional as an open ended reservation of plaintiffs' properties, plaintiffs allege is of a period not less than 25 months requires compensation to be made to plaintiff, and such compensation is prohibited by NJSA 13:1-81B.

Plaintiffs base this proposition on two theories. Initially plaintiffs outline in great detail the procedural steps required to be taken from the time the Commission adopts a plan to the time when certain sites are officially designated as hazardous waste facilities.

It is argued that conservatively speaking, this process must at least span 25 months and in fact, there may not even be an end in sight. Plaintiffs then trace the case law history of how New Jersey courts have construed what is meant by a taking. It observes that the rule as developed in New Jersey that where

governmental action has resulted in a proper owner being deprived of the use of his land for one year, a temporary taking has occurred requiring compensation in the form of an option.

Plaintiffs submit their situation falls squarely in that rule for two reasons. One, plaintiffs have been deprived of the use of their land because the possibility of their property being sited as a hazardous waste facility, has imposed a cloud on any economically advantageous negotiation. In fact, it is alleged that one plaintiff suffered a loss of $6,400,000 because he cannot develop his land as previously contemplated.

Two, the time that will transpire before a final determination is made will be at least 25 months, if not an open ended duration. Thus, plaintiffs allege that a temporary taking has occurred which entitles them to just compensation. It is alleged, NJSA 13:1E-81B prohibits the exercise of eminent domain and in turn, compensation until the site has been adopted by the Commission. And again plaintiff's submit that the final phase will not occur for at least 25 months.

Therefore, plaintiffs maintain that the act permits a taking without just compensation, contrary to New Jersey Constitution, 1947, Article 1, paragraph 20, and United States Constitution, Amendment 14, and is violative of due process of law.

Secondly, plaintiff and third party defendant argue that they are entitled to summary judgment prohibiting the Siting Commission from entering their property because the Commission lacks the present authority to condemn their property. And even if it is determined that the Commission has such a power the subsoil testing proposed constitutes a taking.

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It is urged that the Commission will not have the authority to condemn any property until all of the preliminary stages are complete. These preliminary steps will not be completed for at least twenty-five months. Therefore, presently the Commission does not have the authority to condemn and likewise, may not enter upon any property for preliminary investigation.

Alternatively plaintiffs urge that assuming arguendo that the Commission presently has any authority to enter the lands, what the Commission proposes to do or has done goes far beyond what is constitutionally permissible. In reality the Commission is seeking an easement for subsurface investigations which plaintiffs allege is beyond the perview of the preliminary entry statute, NJSA 20:3-16.

Third plaintiffs contend that the Appellate Division decision in Forbes has no bearing on the case as the legal and factual contentions in Forbes than this case. Unlike the Forbes, plaintiffs do not contend that the land is beyond the Commission's condemnation powers.

On the contrary, plaintiffs say that a condemnation has occurred, and that the statute is unconstitutional because it prohibits payment.

Finally plaintiffs argue that the Commission is capable of designating sites by two methods, even if their relief is granted and therefore the Legislature's purpose in enacting the Siting Act will not be frustrated.

In opposition, defendants initially urge that this matter should be transferred to the Appellate Division because appeals may be taken as of right to the Appellate Division to review final decisions

or actions of any State administrative agency or officer, or to review the validity of any rule promulgated by such agency or officer. Rule 2:2-3A2.

Defendants recognize the one exception to the general rule is where plaintiffs seek to compel condemnation of its property, *Leggler v. New Jersey State Highway Department*, 104 N. J. Super, 289, Appellate Division, 1968.

The reason for this exception is that where a plaintiff seeks to compel condemnation, a mechanism for resolution of factual issues must be available. See *Orleans Builders and Developers vs. Byrne*, 186 NJ Super, 432, 446, Appellate Division, 1982, certification denied, 91 NJ 528, 1982.

Defendants urge that the only inverse condemnation claim in this law suit is one that if plaintiffs lands are proposed for adoption, and if it takes two years between adoption and condemnation and if, during that time the value of plaintiffs property is affected, a taking will have occurred.

If, it states, a complaint in condemnation at all, it states an unripe one. No inverse condemnation claim requirement or dissolution of factual questions are legitimately before this Court and the Pfleger exception to the jurisdiction requirements is simply not applicable.

Defendants also argue that this action is really a challenge to the authority of the commission to implement its decision to identify plantiffs lands as a potential site by testing the lands.

It is submitted the plaintiffs admitted as much in their Notice of Motion and Complaint. Defendants contend that plaintiffs seek

a declaration that the Commission is without authority to enter their lands, and also seek an ordering requiring the State agencies remove those lands from consideration.

Defendants rely on the opinion offered by Judge Arnold in *Vantage, New Jersey, Inc. v. Hazardous Waste Facilities Siting Commission, Docket No. L51344-86C* in which the issue of whether a notice of entry constituted a taking under the eminent domain act was considered. *Vantage* involved real properties situated in Franklin Township which was listed as one of the eleven potential waste facility sites.

In discussing whether the Law Division had jurisdiction to decide this issue, the Court determined that it had with caution, because plaintiff was not challenging defendants' action in issuing the notice of entry. This Court concludes that it has jurisdiction to decide the matter.

The defendants reason that since plaintiffs are challenging defendants action in entering the property, the matter should be in the Appellate Division. Defendants also argue that even if this case did legitimately involve claims of inverse condemnation, the Supreme Court has stated that under the entire controversy doctrine, a case raising issues restricted by rule to initial resolution in the Appellate Division is to be transferred in its entirety to the Appellate Division.

Transfer is required even if the case also contains issues of which a trial court would otherwise have had jurisdiction by statute. *Pascucci, PASCUCCI, v. __aggot, 71 N.J. 40, at pages 52 to 53, 1976.* The Supreme Court noted that such a result served the ends of sounds judicial administration by avoiding the inconvenience, delay and expense instant to separate trials, at page 53.

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Applying that rationale, defendants maintain that even if this case legitimately raised an inverse condemnation claim generally to be heard in the Law Division, the existence of other challenges to the Commission's decision and its implementation require that the entire case be transferred. See also, *Ocean Cablevision Associates vs. Hovbuilt, Inc. 210 N.J. Super 626, 635, Law Division, 1986.*

In that case there was a claim of inverse condemnation against a cable television installer and was held cognizable only in the Appellate Division because its basis was the alleged unconstitutionality of a regulation promulgated by the Board of Public Utilities.

For those reasons defendants strongly urge that this matter shall be transferred to the Appellate Division for review. Plaintiffs have submitted a reply memorandum for defendants cross motion to transfer to the Appellate Division.

It is plaintiffs claim that the present situation has affected a taking in the form of an option for which compensation was to be made and the proposed onsite activities of the Commission require an easement for which compensation must be made.

Furthermore, plaintiffs maintain that this is an inverse condemnation matter and properly belongs in the Law Division. Plaintiffs are of the opinion that this precise issue raised by plaintiffs' cross motion was raised and rejected by the Supreme Court in *Schiavone v. Hackensack Meadowlands Development Commission, 98 NJ 258, 1985.* Where the action was originally brought in the Appellate Division, but on appeal the Supreme Court remanded it to the Law Division.

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Moreover, plaintiffs argue the Commission has brought this same motion, and it had been determined adversely to them in *Vantage Industries v. Siting Commission* and *Forbes vs. Siting Commission*.

Finally, plaintiffs maintain that the Commission is not a state agency for jurisdictional purposes and therefore, appeal from its decision are accountable in the trial division. For those reasons plaintiff contended it is clear that jurisdiction in this matter is in the trial division, Superior Court, and not the Appellate Division.

Given the fact that an affirmative disposition to defendants cross motion to transfer the matter to the Appellate Division would for purposes of this trial court, render moot all other issues. It is appropriate at this time to rule on defendants' cross motion.

In that regard, I make the following findings of fact and conclusions of law, New Jersey Court Rule 2:2-3A2, provides that appeals may be taken to the Appellate Division as of, right to review final decisions or actions of any state administrative agency or office. And to review the validity of any rule promulgated by such agency or office.

Initially I am not persuaded by the plaintiffs' contention that for jurisdictional purposes, a Commission is not a State agency. NJSA 13:1E-2 establishes, "In the executive branch of the State Government, the public body, corporate and politic, with corporate succession to be known as a Hazardous Waste Facility Siting Commission, the Commission is allocated with the Department of Environmental Protection. The Commission is a constituted instrumentality of the State exercising public and essential governmental functions, NJSA 13:1E-52.

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March 21, 1969, the Appellate Division recognized the distinction which exists between an ordinary State agency operating as an arm of the executive branch and the various authorities which the Legislature has created as entities independent in the State.

Garden State Parkway Employees Union versus New Jersey Highway Authority, 105 NJ Super 168, 170 Appellate Division, 1969. Based on that distinction the Court ruled that the defendant Highway Authority was not a State Administrative agency.

However in analyzing the definition of the commission, provided by the Legislature, and utilizing the distinction set forth above, I am satisfied that the Hazardous Waste Facility Siting Commission is an arm of the executive branch and is not an entity independent in the State.

Although I recognized that the holding in *Garden State Parkway* somewhat questioned, — given the Supreme Court's determination. *Jacobs versus New Jersey State Highway Authority, 54 NJ 393, 1969* is the means enunciated in Garden State Parkway by which I am guided and no so much the result.

In Jacobs, the Supreme Court decided that approximately four months after Garden State Parkway, that a suit brought against the New Jersey State Highway Authority was properly cognizable in the Appellate Division under then Rule 4:88-8, now Rule 2:2-3A2.

Furthermore the Legislature has defined a State Agency to include each of the principle departments in the Executive Branch of the State Government; and all boards, divisions, commissions, agencies, departments, councils, authorities, offices or officers

within any such department now existing or hereafter established and authorized by statute to make, adopt or promulgate rules or adjudicate contested cases except the office of the Governor, NJSA 52:14B-2A.

Based upon the foregoing I find plaintiffs argument is without merit. Therefore the Hazardous Facilities Siting Commission is a State Administrative Agency for purposes of Rule 2:2-3A2. However, this does not end the matter.

Initially defendants contended that this action seeks a review of action taken by State agency and as such Rule 2:2-3A2 mandates that the review should be had in the Appellate Division.

I am not so convinced. As Counsel agree, with regard to Millstone and East Greenwich, the siting process is in its preliminary stages. I conclude that there has been no state action or lack thereof which would activate the automatic Appellate process,

In fact, the Legislature specifically pointed out when such an event is to be construed to have occurred, and I quote, "5. Within 30 days of the receipt thereof, the Commission shall affirm, conditionally affirm or reject the recommendation of the Administrative Law Judge and adopt or withdraw the proposed site. Such action by the Commission shall be based upon the potential for the significant impairment of the environment or the public health, and shall considered to be final agency action thereon for the purpose of the Administrative Procedure Act, and shall be subject only to judicial review as provided in the rules of Court, NJSA 13:1E-59A5.

Had the Legislature intended an earlier point it would have

so provided. For the purposes of this cross motion only, I recognize while neither complaint seeks a judgment compelling the Commission to condemn plaintiffs properties, the underlying theme pervading counsels arguments is inverse condemnation claims.

In effect, plaintiffs urge that there has been a taking without just compensation. It is well settled, condemnation action are to be brought in the Law Division. *Pfleger versus N.J. State Highway Department, 104 NJ Super 289, 291 Appellate Division, 1968.* In re: *Jersey Central Power and Light Company 166, NJ Super, 540, 544, Appellate Division 1979. Schiavone Construction v. Hackensack, 98 NJ 258, 265, 1985.*

The Eminent Domain Act of 1971 governs all condemnation cases, NJSA 20:3-4. This includes cases for inverse condemnation. Sorbonne at page 265. Jurisdiction in inverse condemnation proceedings should be in the Law Division of this Court where a factual record can be developed. *Orleans Builders and Developers v. Byrne, 186 N.J. Super, 432, 446, Appellate Division, 1982, certification denied, 91 NJ 528, 1982.*

Although defendants argue that any inverse condemnation claim is hypothetical and speculative. I am convinced that this Court is the appropriate forum to determine the validity of the allegations, so that a factual record can be established. *Orleans Builders and Developers vs. Byrne, 186, NJ Super 432, 446, Appellate Division, 1982.*

Defendants alternatively submit that since plaintiffs are really challenging the defendants' authority to propose, adopt and enter the lands, Appellate Division is the appropriate forum. Defendants urge that there is support for this proposition.

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In Judge Arnold's comments contained in *Vantage New Jersey, Inc. v. Hazardous Waste Facilities Siting Commission, Docket No. L-51344-86E.* In Vantage it was stated, because plaintiff is not challenging defendants' action in issuing the notice of entry, this Court, a Law Division, concludes it has jurisdiction to decide the matter.

I am not bound by Judge Arnold's Law Division decision in *Vantage, Mazza v. Insurance Company of North America, 149 NJ Super, 60, 62, Law Division, 1977.* Our system of juris prudence envisions that while the opinions of courts of coordinate jurisdiction be taken into consideration, they are nevertheless not binding on a court of equivalent rank. *Wolf vs. Home Insurance Company, 100 NJ Super, 27, page. 35, Law Division, 1968, affirmed 103 NJ Super, 351 Appellate Division, 1968.*

Secondly the opinion in Vantage has not been approved for publication, and as such does not constitute nor is it binding upon this Court. Rule 1:36-3.

Furthermore the aforementioned comment should not be read beyond what is intended especially, given the fact that it addresses an issue not before the Vantage Court. With these guidelines in mind. I shall not take Judge Arnold's dicta out of context and rely on it decide an issue not squarely presented before Judge Arnold.

Therefore, this Court is not persuaded by the defendants' analogy to that limited finding enunciated in Vantage. Defendants also rely on the entire controversy doctrine claiming that a case raising the issues restricted by rule to is to be transferred in its entirety to the Appellate Division.

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Thus defendants contend that even if this case legitimately raised an inverse condemnation claim generally to be heard in Law Division, the existence of other challenges require that the entire case be transferred.

However, defendants fail to persuade this Court of the existence of other purported challenges which require automatic Appellate review and have not previously disposed of.

For the foregoing reasons I am satisfied this Court is the appropriate forum to dispose of this matter and therefore, defendants' motion to transfer this case to the Appellate Division is denied.

I shall now proceed to dispose of the substantive issues raised on the motions and since the issues are similar in Glouster and Monmouth County. I shall address these issues in each of the consolidated cases.

Plaintiffs first argue that a taking has occurred for which the Act does not permit compensation to be paid until after the following four events have occurred. First the site on which the facility would be constructed has been adopted by the Commission pursuant to the provisions of this Act.

Second agreement has been entered into between the Commission and the Hazardous Waste Industry for compensation for the land or any interest there acquired by the Commission will be provided by the hazardous waste industry.

Third, the hazardous waste industry has sought to obtain the land or any interest therein from the owner thereof, in good faith bargaining.

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And four, the hazardous waste industry has already obtained the approval of the New Jersey Department of Environmental Protection for the registration statement and engineering design for waste facility to be constructed on the land.

Plaintiffs urge that at least twenty-five months must pass before these events can occur, and in reality the duration will probably be longer if not unlimited. Therefore a temporary taking has occurred in the form of an option for *Lomarch Corp. v. Mayor of Englewood, 51 NJ 108, 1968. Washington Market Industries vs. Trenton, 68 NJ 104, 1975, Sorbonne Construction v. Hackensack Meadowlands Development, 98 NJ 258, 1985.*

I am not persuaded by the plaintiffs argument that the minimum contemplated time from site proposal to approval of registration statement, engineering design is 25 months. That is a maximum contemplated time. Almost all of the time constraints contained in the Act speak of the time within the immediately preceding event.

For example, within eighteen months of the effective date of the Act, or within six months of the receipt of the criteria from the department, whichever is sooner, the Commission shall propose site, and provide the governing body with a grant. NJSA 13:1E-59A1. Within six months of the receipt of a grant from the Commission, the governing body shall complete and transmit to the Commission, the site suitability study, NJSA 13:1E-59A2.

Within 45 days of receipt by the Commission of the Site Suitability Study, a hearing shall be conducted. NJSA 13:1E-59A3. Thus the actual time involved might be considerably less than the Act's 25 months maximum.

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The question however, still remains that whether or not the Commission's action thus far constitutes a taking in the Constitutional sense. As plaintiffs correctly point it, it is axiomatic that New Jersey Constitution 1947, Article 1, paragraph 20, and the United States Constitution, Amendment 14, require government to pay just compensation for a taking.

Private property should not be taken for public use without just compensation. New Jersey Constitution Article 1, paragraph 20. The Courts have held that the mere plotting or planning and anticipation of a public improvement does not constitute a taking or damaging of the property affected. *State vs. Carragen, 36 NJL 52, 1872, Sorbino v New Brunswick, 43 NJ Super, 554 Law Division, 1957, Kingston East Realty Co. v. State of New Jersey, 133 NJ Super, 234 Appellate Division, 1975, Fargold Construction Co. v. Chatham, 141 Super, 164, Appellate Division, 1976, Schnack vs. State, 168 NJ Super 343, Appellate Division, 1978.*

Annotations Condemnation preimprovement planning, 37A, 127, 1971. This holding was specifically quoted in Kingston East Realty Co. at page 239. The mere plotting and planning in anticipation of condemnation, then the actual physical appropriation or interference, does not constitute a taking or compel a state to institute condemnation proceedings.

Plaintiffs argue that this holding can no longer be considered good law in light of the Supreme Court statement in *Washington Market Enterprises vs. Trenton, 68, NJ 107, 110, 1975* which was decided four months after Kingston East Realty Co.

That we hold that where planning for urban redevelopment

is clearly shown to have such a severe impact substantially to destroy the beneficial use which a landowner has made of his property, then there has been a taking of propery within the meaning of that institutional phrase. *Washington Market at page 110.*

Plaintiffs hold that the holding in *Schnack v State, at page 349* is also incorrect because Shank relies on Kingston. Although plaintiffs argument is creative, it is for a superior court to determine what remains to be good law and not for the litigants.

The Court in *Fargold Construction Co. v Chatham, 141, NJ Super 164, 169 Appellate Division, 1976* cited the Kingston rule and then continues to differentiate *Washington Market Enterprises v. Trenton.*

If the Appellate Division found Kingston rule to be at odds with the holding in Washington Market, then that would have provided the occasion to so rule. They did not do that however.

In the federal jurisdiction, the rule is similar as stated in *Kirby Forest Industries, Inc. v. United States, 467, US 1, 104, Supreme Court, reported to 187, 1984.* Where notice of lis pendens was filed simultaneously with the following of a complaint in condemnation, the Court concluded, however we do not find prior to the payment of the condemnation award in this case, in interference with petitions of property interest severe enough to give rise to a taking under the foregoing theory. Kirby at page 104. Strike that, 104 at Supreme Court, at 2196.

Plaintiffs further argue that the Commission's action have in fact deprived plaintiffs of property without due process of law. They base this proposition on the allegation that the designation

of the sites has prevented development of their land in an economically advantageous manner.

To determine whether this argument has merit, it is appropriate to draw upon the decisional law analogizing the condemnation by regulation. *Schnack v. State at page 349.* In such cases, it is generally held that governmental regulations which effectively deprives an owner of all reasonable uses of his property amounts to a compensable taking. By contrast, regulations which leave the owner free to reasonably use his property and the restrictions imposed by the populations and also with diminution in market value are not regarded as compensable.

The actions of the defendants herein have not deprived the land owners of all beneficial use of their land for an indeterminate length of time. *East Rutherford Industrial Park v State, 119 NJ Super 352, 371 (Law Div.) 1972.*

In fact the Commission has not abridged any rights of plaintiffs with regard to their lands. As was stated in *Kirby Forest Industries, 467, US 1, 1984.* Nor did the Government abridge petitioner's right to see the land if it wished. It is certainly possible as petitioner contends that the initiation of condemnation proceedings, publicized by the filing of the notice of lis pendens reduced the price that the land would have fetched, but impairment of the market value of the real property incident to otherwise legitimate action ordinarily does not result in a taking.

See, *Agins v. City of Tiburon, 447, U.S. at page 263, note 9, 100 Supreme Court Reporter at page 2143, note 9: Danforth versus United States, 308 U.S. at 285, 60 Supreme Court, at pages 236, 237, Village of Euclid v. Ambler Realty, 272 U.S. 365, 47 Supreme Court Reporter, 114.*

Appendix B

At least in the absence of an interference with an owner's legal right to dispose of his land, even a substantial reduction of the attractiveness of the property to potential purchasers does not entitle the owner to compensation under the Fifth Amendment. See, *Kirby at 104 Supreme Court at 2197.*

Plaintiffs may still continue to use their land as before. Even if the bare allegation that further progress in advancing the financing was halted due to the risk of uncertainty placed on the land is sustainable, — such a burden is an incident of ownership only and certainly at a substantial destruction of the beneficial use of their property. *Danforth versus United States, 308 US. 271, 1939.*

For these reasons I find that the Commission's action in identifying plaintiffs lands as a potential proposed site did not result in a taking for which compensation must be paid, nor does the siting process violate plaintiff's right to due process of lands.

Therefore, Count I and Count III of the First Amended Complaint filed in the Monmouth County action are dismissed with County VI and Count VII of the First Amended Complaint for Declaratory Equitable Relief originally filed in Gloucester County matter are also dismissed for all of the reasons stated heretofore.

In conclusion, the Court summarizes its disposition of the matters presented before it today as follows: Plaintiffs motion for summary judgment is denied for reasons consistent with the above findings.

Defendants cross motion to transfer this matter to the Appellate Division is denied for reasons stated herein.

Appendix B

Counts I, II, III and IV of the Monmouth County action dismissed for the reasons herein before stated.

Counts I, II, III, IV, V, VI, VII and VIII of the Gloucester County action which is now consolidated with the Monmouth County Action is dismissed for the reasons herein before stated.

Accordingly the complaints filed in Monmouth County and Gloucester County be and the same are hereby dismissed.